

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

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Date of decision: 08.03.2019

RSA No. 773 of 2013 (O&M)

Ram Mehar and another*Appellants*
Versus
Suresh Kumar and others*Respondents*

RSA No. 810 of 2013 (O&M)

Ram Mehar and another ...*Appellants*
Versus
Puran Chand and others*Respondents*

Coram: Hon'ble Mrs. Justice Rekha Mittal

-.-
Present: Mr. Keshav Partap Singh, Advocate
for the appellants

Ms Alka Sarin, Advocate
for the respondents

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Rekha Mittal, J.

CM 2148-C of 2013

Prayer in this application is for condoning delay of 20 days in
filing the appeal.

Heard.

In view of averments made in the application supported by an
affidavit and arguments advanced, the application is allowed and delay of
20 days in filing the appeal stands condoned.

Main case

Challenge in the present appeals has been directed against the

judgement and decree dated 05.10.2012 passed by the Additional District Judge, Gurgaon whereby appeals against judgement and decree dated 12.10.2011 passed by the Civil Judge (Junior Division), Gurgaon were decided vide common judgement and decree dated 05.10.2012. The appeal preferred by the appellants/plaintiffs was dismissed whereas appeal preferred by the respondents/defendants was allowed and consequently, suit filed by the appellants/plaintiffs was dismissed with costs.

The present litigation pertains to land measuring 22 kanal 12 marlas situated in village Bohra Kalan, Tehsil and District Gurgaon in respect whereof '*dohli*' was created in favour of Kundan husband of Javitri Devi. The appellants/plaintiffs have claimed themselves to be collaterals of Kundan and challenged the mortgage purported to be created by Javitri in favour of predecessor-in-interest of the respondents/defendants on 03.05.1966. It is averred that suit land is a '*dohli*' given in '*punarth*' by owners of the land and as such, the same is not transferrable by way of sale, gift, mortgage etc. The appellants claimed that they are in cultivating possession of suit land though the respondents are shown to be in possession thereof in the revenue records with the submission that the entries to this effect are wrong and not according to the spot.

Respondents/defendants No. 1 and 3 filed the written statement raising preliminary objections regarding locus standi, non-joinder of necessary parties etc. It is submitted that Javitri was 'dohlidar' of the suit land. However, it was denied that Javitri died 20 years ago or the appellants are collaterals of Kundan husband of Javitri. It is further averred that the respondents are in possession of suit land being mortgagee with

possession since the year 1966; mortgage has not been redeemed within limitation; equity of redemption has become extinguished and the respondents are not liable to be dispossessed who had acquired the status possessed by Javitri.

The trial Court framed the following issues:-

1. *Whether Smt. Javitri Devi widow of Kundan is wrongly recorded as dholidar of the suit land detailed in para No. 1 of the plaint situated within the revenue estate of village Bhora Kalan, Tehsil and District Gurgaon? OPP*
2. *Whether the revenue entries of mortgage in favour of defendants are illegal, non est and not binding upon the plaintiffs? OPP*
3. *Whether the plaintiffs are entitled for the declaration as prayed being collaterals of Kundan, the husband of Javitri and that the defendants have not right, title or interest qua the suit land in their favour? OPP*
- 3A. *Whether Smt. Javitri Devi is not alive and is not heard of and is civilly dead? OPP*
4. *Whether suit of the plaintiff is not maintainable as Smt. Javitri Devi is still not alive and that the plaintiffs are in possession? OPD*
5. *Whether the suit is bad for non-joinder of necessary parties? OPD*
6. *Relief.*

The parties were permitted to adduce evidence in support of their respective contentions. Having heard counsel for the parties in the light of materials on record, the trial Court decided necessary issues No. 1 to 3, 3A and 4 against the plaintiffs but issue No. 5 was decided against the

respondents/defendants and eventually, suit filed by the appellants/plaintiffs was partly decreed to the extent that mortgage executed in favour of respondents is illegal, null and void *ab inito* but the respondents cannot be ejected or evicted except in due course of law.

As has been noticed hereinbefore, the judgement and decree passed by the trial Court led to filing of two appeals captioned '*Suresh Kumar and others vs. Ram Mehar and another*' Civil Appeal No. 18 of 2011 and '*Ram Mehar and another vs. Puran Chand and others*' Civil Appeal No.19 of 2011, decided by the first appellate Court, in terms indicated herein-before.

Feeling aggrieved against the judgements and decrees passed by the Courts rejecting part of claim of the plaintiffs by the trial Court and dismissal of their suit by the appellate Court, the plaintiffs/appellants have filed two separate appeals bearing RSA No. 773 and 810 of 2013.

Counsel for the appellants would urge that the appellate Court has grossly erred by holding that '*dohli*' for '*punarth*' was created without any terms and conditions and there was no restriction on use of '*dohli*' and as such, transfer of land by Smt. Javitri through mortgage in favour of respondents cannot be held to be void. To bring home his contention, he has referred to entries in the remarks column of jamabandi for the year 1877, Ex.P2 wherein it has been specifically recorded that *dohlidar* shall not be entitle to transfer the land by way of sale/mortgage etc. in any circumstances. It is further argued that as Smt. Javitri wife of Kundan mortgaged the suit land in violation of terms and conditions of '*dohli*' in favour of *dohlidar*, the mortgage created by Jaivtri is illegal and void *ab*

inito.

Counsel would argue that in para 2 of the plaint, pedigree table has been shown. It is argued that on the basis of entries in jamabandi on record, it has been sufficiently established that the appellants are the collaterals of Shri Kundan being the great grandsons of Saran brother of Shalga, grandfather of Kundan, therefore, they become entitle to inheritance to Smt. Javitri being legal heirs of her husband Shri Kundan. Further argued that the appellate Court has wrongly set aside findings of the trial Court that Smt. Javitri is civilly dead and has been rightly declared to be so from the date of institution of the suit giving right of inheritance to the appellants and they being entitle to file the suit to challenge the alleged mortgage by Javitri in favour of predecessors-in-interest of the defendants/respondents.

Counsel representing the respondents has supported the judgement and decree passed by the appellate Court with the submissions that the trial Court has committed a serious error by accepting the appellants to be collaterals of Kundan or Javitri being civilly dead having been not heard for the past more than seven years before institution of the suit by invoking Sections 107 and 108 of the Evidence Act. However, counsel has fairly conceded that in view of Full Bench judgement of this Court '**Ram Kishan and others vs Sheo Ram and others**', 2008 (1), R.C.R. (Civil) 334, affirmed by Hon'ble the Supreme Court in '**Singh Ram (D) through LRs vs. Sheo Ram and others**', 2014 (4) R.C.R. (Civil) 179, contention raised by the respondents in respect of extinguishment of right of the mortgagor to get the land redeemed is no longer available to the

respondents.

I have heard counsel for the parties, perused the paper book and records.

The appellants/plaintiffs in para 1 of the plaint had raised a plea that Smt. Javitri widow of Kundan is wrongly recorded as *dohlidar* of agriculture land measuring 22 kanal 12 marlas. Counsel for the appellants, in response to a query, would fairly concede that on death of Kundan, 'dohli' right created in favour of Kundan was inherited by Smt. Javitri as widow. That being so, contention of the appellants raised in para 1 of the plaint is patently misconceived and liable to be rejected.

The appellants/plaintiffs claimed rights in the suit property by asserting themselves to be collaterals of Kundan and on civil death of Javitri wife of Kundan. In para 3 of the plaint, it is averred that Smt. Javitri died way back 20 years ago. She left the village and had not been heard of for more than 20 years. She is not traceable in spite of search. She has not been seen by the persons who are known to her. Since she has not been heard of for the last 20 years, she is presumed to be dead.

The appellate Court set aside findings of the trial Court on issue No. 3A by taking into consideration the facts elicited in cross examination of the witnesses of the appellants. Perusal of cross examination of Ram Mehar (PW1), shows that Smt Javitri had left for village Rohi Nandhera District Bulandshehar. She used to reside in village Rohi Nandhera District Bulandshehar. She also used to visit Village Kharkhari, District Gurgaon and she had not been heard of since 1983. The appellants did not examine a witness from village Rohi Nandhera, District

Bulandshihar or member of parental family of Javitri to establish their plea that Javitri is not heard of for the past more than seven years by members of her parental family where she was residing after leaving the village of her husband in District Gurgaon. Both the witnesses Ram Mehar and Ram Singh have not stated that they visited village Nandhera District Bulandshihar in search of Javitri but could not find her despite their best efforts. That being so, the appellate Court has rightly held that the facts elicited in cross examination of Ram Mehar (PW1) and Ram Singh (PW2) creates a dent in their plea that Javitri is not heard of for the past more than seven years and she is to be declared civilly dead, in view of the relevant provisions of the Evidence Act.

To be fair to the appellants, counsel has submitted that Ram Mehar (PW1) in his cross examination has stated that age of Javitri would have been 125 years, had she been alive. It is sought to argue that in view of age of Javitri Devi, it cannot be presumed that she is alive. This contention of the appellants cannot be accepted because there is no such provision in the Evidence Act that a person can be presumed to be civilly dead on the basis of her having attained a particular age at a particular point of time. Apart from this, statement of Ram Mehar with regard to age of Javitri gets contradicted in view of testimony of Ram Singh (PW2) who had stated that age of Javitri would be approximately 70-75. Examined from any angle, I do not find an error much less perversity in findings of the appellate Court negating plea of the appellants that Javitri is civilly dead and they are entitle to claim inheritance to Smt. Javitri. No sooner the appellants have failed to establish that Smt. Javitri is presumed to be dead,

they cannot maintain their claim irrespective of whether they have established themselves to be collaterals or otherwise of Kundan.

Findings of the appellate Court that '*dohli*' was created without any terms and conditions are factually incorrect when examined in the light of remarks recorded in the jamabandi Ex P2/B, highlighted by counsel for the appellants. Both the Courts did not advert to the issue that even if '*dohli*' was created subject to restrictions against alienation by sale, mortgage etc. but if *dohlidar* had violated the restrictions or created mortgage by violating the conditions, can a *dohlidar* seek setting aside of mortgage by saying that the same was created in violation of terms and conditions of *dohli*. However, counsel for the appellants was asked this question but he failed to give any satisfactory reply. There cannot be dispute that a person cannot take advantage of his own wrong nor can get a transfer set aside by contending that he was not competent to do so. That being so, if Javitri who created mortgage could not file a suit seeking declaration that the mortgage is null and void, how can the appellants who are claiming right of inheritance through Javitri, can be heard to say that as the mortgage violates the terms and conditions of '*dohli*', the same is liable to be set aside.

The appellants have claimed themselves to be collaterals of Kundan husband of Javitri. They have failed to lead clear and tangible evidence to establish their relationship with Kundan. Analysed from any angle, claim of the appellants in respect of suit land has rightly been rejected by the appellate Court. I do not find an error much less perversity in findings of the appellate Court dismissing the suit except factual error

qua terms and conditions of '*dohli*' discussed herein-before.

In view of what has been discussed herein-before, finding no merit, the appeals fail and are accordingly dismissed with costs.

(Rekha Mittal)
Judge

08.03.2019
Mohan Bimbura

Whether speaking/reasoned: Yes/No
Whether reportable : Yes/No